Supreme Court, U.S.
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NO. 02-1183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *Petitioner*,

v.

SAMUEL FRANCIS PATANE, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Samuel Patane, by and through his court appointed counsel, Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Brief for Respondent in Opposition. In support of this request, respondent states that undersigned counsel was appointed pursuant to the

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Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for the costs attendant to the proceedings before this Honorable Court.

WHEREFORE, respondent Samuel Patane, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does the fruit of the poisonous tree doctrine apply to physical-evidence fruit of a Miranda violation?

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STATEMENT

Following a suppression hearing in the United States District Court for the District of Colorado, the district court ordered the suppression of a gun the United States intended to use in prosecuting respondent Samuel Patane under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. (ROA: 10-13-01 TS at 2-11). Following an interlocutory appeal taken by the United States, the court of appeals affirmed. United States v. Patane, 304 F.3d 1013 (10th Cir. 2002). Rehearing en banc was denied. (Pet. at App. B).

1. On June 3, 2001, a state court issued a temporary restraining order against Mr. Patane. (ROA: Supp. Exh. B). The order prohibited Mr. Patane from making direct or indirect contact with his ex-girlfriend, Linda O'Donnell, for three days. (ROA: 9/27/01 TS at 5). The day after the order was issued, June 4, 2001, Ms. O'Donnell answered her telephone, only to have the caller hang up. (ROA: Supp. Exh. A). Ms. O'Donnell's subsequent activation of the "*69" feature on her telephone showed that the call had come from Mr. Patane's home telephone number. (Id.). Ms. O'Donnell did not report the hang-up call to the police.

Two days later, on June 6, 2001, the day the restraining order was to expire, Mr. Patane's probation officer called the Bureau of Alcohol, Tobacco, and Firearms (ATF) to report that Mr. Patane, a convicted felon, was in possession of a .40 caliber Glock pistol. (ROA: 9/27/01 TS at 30-31). The probation officer reported further that Mr. Patane was under a temporary restraining order involving his ex-girlfriend, Linda O'Donnell. (Id.).

After the probation officer's call to ATF, local police officer Tracy Fox was sent to contact Ms. O'Donnell to see whether any violations of the soon-to-expire restraining order had occurred. (Id. at 4, 32). Ms. O'Donnell told Officer Fox that the only contact that had occurred was the single hang-up phone call two days earlier. (ROA: Supp. Exh. A). Ms. O'Donnell also said that Mr. Patane had a gun and that she was afraid he would kill her. (ROA: Supp. Exh. B).

Detective Josh Benner, a local officer assigned to work with ATF, also contacted Ms. O'Donnell, to question her about Mr. Patane's possession of the gun. (ROA: 9/27/01 TS at 29-32). Ms. O'Donnell told Detective Benner that she had been with Mr. Patane at a gun show a month before, that he had purchased a Glock, and that she had given him suggestions on where to go to practice shooting the gun. (ROA: 9/27/01 TS at 31-32; Supp. Exh. C).

After talking to Ms. O'Donnell, Detective Benner and Officer Fox went to Mr. Patane's house to arrest him for violating the restraining order. (ROA: Supp. Exh. B, C). Another officer, Officer Mulso, came along to assist in the arrest. (ROA: 9/27/01 TS at 7). When they got to Mr. Patane's house, Officers Fox and Mulso went to the front door while Detective Benner went around to guard the back door in case Mr. Patane tried to run. (Id. at 7-8). When Mr. Patane came to the door in response to the officers' knock, the officers asked him to step outside. (Id.) When Mr. Patane complied, Officer Fox said she was there in regard to a restraining order violation Ms. O'Donnell had reported. (Id. at 23-24). Mr. Patane denied making any attempt to contact Ms. O'Donnell in violation of the restraining order. (ROA: Supp. Exh. B). Officer Fox nonetheless arrested him for violating the restraining order. (ROA: 9/27/01 TS at 8).

After informing Mr. Patane that he was under arrest, Officer Fox asked him if he had any identification and if he would like to get his shoes. (Id. at 8, 15). Mr. Patane turned to go back into the house, and the officers followed him inside. (Id. at 9, 15-16). When the officers followed Mr. Patane into his bedroom, he became very upset and started to cry. (Id. at 9, 24). At this point, the officers handcuffed Mr. Patane and took him back outside. (Id.)

Detective Benner came back around to the front of the house. (Id. at 9, 34). Mr. Patane was still very upset. (Id. at 41-42). Detective Benner started reading Mr. Patane his Miranda rights, informing him that he had the right to remain silent. (Id. at 34-35). Mr. Patane cut the detective off at that point, telling him he knew his rights. (Id.) Without ascertaining whether Mr. Patane wished to waive his rights, and without informing him that his rights included the right to have an attorney present during questioning, to have an attorney appointed to represent him if he could not afford one, and the right to have questioning cease at any time, Detective Benner proceeded to question Mr. Patane about the Glock pistol. (Id.).

Detective Benner began by saying he was with the ATF gun interdiction unit and wanted to talk to Mr. Patane about the guns he owned. (Id. at 34-35). Mr. Patane said his .357 was already in police custody. (Id.). Detective Benner said he was more interested in the Glock. (Id.). Mr. Patane said he was not sure he should tell him about the Glock because he did not want the detective to take the gun away. (Id.).

Detective Benner said he needed to know about the Glock and that if Mr. Patane wanted "to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm." (Id. at 35, 43). (Id.). Mr. Patane then told the detective that the Glock was in the house, on a shelf in his bedroom. (Id.). Detective Benner asked if he could go get the gun. (Id. at 36). According to the detective, Mr. Patane said he could.[1] (Id.).

Detective Benner entered the house, found the gun where Mr. Patane said it would be, and seized it. (Id.). When Detective Benner got back outside, he asked Mr. Patane, in the presence of Officer Fox, where Mr. Patane had gotten the gun. (ROA: 9/27/01 TS at 36; Supp. Exh. B). According to Officer Fox, Mr. Patane said that Linda O'Donnell had purchased the gun at a gun show a month before. (ROA: Supp. Exh. B). According to Detective Benner, Mr. Patane said that it was he who had obtained the gun from the gun show. (ROA: 9/27/01 TS at 36; Supp. Exh. C). Mr. Patane was then taken to jail and booked on the charge of violating a restraining order. (ROA: 9/27/01 TS at 10). A violation of a restraining order is a misdemeanor under Colorado law. See C.R.S. 18-6-803.5.

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[1] Mr. Patane disputed Detective Benner's contention that he consented to an entry of his home and to seizure of the gun. (ROA: doc. 12). The district court made no finding on this question.

2. Mr. Patane was subsequently charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (ROA: doc. 6). After he was indicted, he moved to suppress both the statements made in response to Detective Benner's questioning and the gun the detective seized as a result of the questioning. (ROA: doc. 12). Mr. Patane asserted that he was arrested without probable cause, that Detective Benner did not comply with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), and that his statements were involuntary. (Id.). The United States conceded in response to the motion that the statements were obtained in violation of Miranda. (ROA: 10/3/01 TS at 11). The government maintained that the gun was properly seized, however, and should not be suppressed. (Id. at 2-11).

The district court held a hearing on the motion. (ROA: 9/27/01 TS). After hearing evidence, the district court granted the suppression motion both as to the statements and as to the gun. (ROA: 10/3/01 TS). In granting the motion, the district court held that Mr. Patane's arrest was unlawful because the police lacked probable cause to believe that a violation of the restraining order had occurred. The court reasoned that a single hang-up call, which could be inadvertent, does not establish probable cause to believe a violation of a restraining order has occurred. The court reasoned further that both the gun and Mr. Patane's statements, which statements were independently suppressible due to the Miranda violation, were fruits of the illegal arrest, and that suppression was thus required. (ROA: 10/3/01 TS at 2-11).

The court specifically declined the government's request that it rule on the question of whether Mr. Patane's statements were voluntary. (Id. at 11).

3. The United States took an interlocutory appeal, challenging only the suppression of the gun. The United States argued that the district court erred in suppressing the gun because: 1) Mr. Patane's arrest was lawful because the police had probable cause to arrest him for violating the restraining order; 2) the arrest was lawful because the police also had probable cause to arrest Mr. Patane for being a felon in possession of a firearm; and 3) the gun was not suppressible as a fruit of the Miranda violation because the fruit of the poisonous tree doctrine does not apply to physical-evidence fruit of a Miranda violation. (Opening Brief of the United States).

Mr. Patane argued in response that the district court correctly suppressed the gun because: 1) the police lacked probable cause to arrest Mr. Patane for violating the restraining order; 2) the police lacked probable cause to arrest Mr. Patane for being a felon in possession of a firearm; 3) if probable cause existed, the warrantless arrest of Mr. Patane for a misdemeanor committed two days earlier violated the Fourth Amendment because the Fourth Amendment prohibits warrantless arrests for misdemeanors unless the misdemeanor was committed in the presence of the arresting officer; and 4) if the arrest was proper, the gun was nonetheless properly suppressed because it was the physical-evidence fruit of a Miranda violation. (Answer Brief of Samuel Patane).

The court of appeals affirmed. The court held that, while it disagreed with the district court's conclusion that there was no probable cause to arrest Mr. Patane for violating the restraining order, the gun was nonetheless properly suppressed because it was the physical-evidence fruit of a Miranda violation. The court of appeals did not reach either the United States' argument that probable cause existed to arrest Mr. Patane for being a felon in possession of a firearm or Mr. Patane's argument that the Fourth Amendment prohibits warrantless arrests for misdemeanors not committed in the presence of the arresting officer. United States v. Patane, 304 F.3d 1013 (10th Cir. 2002).

The United States' subsequent petition for rehearing en banc was denied. (Pet. at App. B).

ARGUMENT

Petitioner argues that the court of appeals erred in determining that the fruit of the poisonous tree doctrine applies to the physical-evidence fruit of a Miranda violation. (Pet. at 5-10). The court of appeals' holding, however, is dictated by this Court's decisions in Wong Sun v. United States, 371 U.S. 471 (1963), and Dickerson v. United States, 530 U.S. 428 (2000), and further review is therefore unwarranted.

1. In Wong Sun v. United States, 371 U.S. 471 (1963), this Court established that evidence derived from a constitutional violation must be suppressed unless "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" 371 U.S. at 487 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). The inquiry, described in Wong Sun as the "fruit of the poisonous tree" doctrine, is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, 371 U.S. at 488 (quoting Maguire, Evidence of Guilt, 221 (1959)).

In Dickerson v. United States, 530 U.S. 428 (2000), this Court made clear that a failure to comply with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), is a constitutional violation. Dickerson, 530 U.S. at 444 ("In sum, we conclude that Miranda announced a constitutional rule. . ."). Consequently, the fruit of the poisonous tree doctrine applies to the fruit of a Miranda violation, at least where that fruit is physical evidence, just as the doctrine applies to the fruit of any other constitutional violation.

2. Notwithstanding this Court's decisions in Wong Sun and Dickerson, petitioner argues that the court of appeals' holding that the fruit of the poisonous tree doctrine applies to the physical-evidence fruit of a Miranda violation conflicts with

this Court's precedents. (Pet. at 5-10). Specifically, petitioner argues the court of appeals' holding conflicts with this Court's decisions in Michigan v. Tucker, 417 U.S. 433 (1974), and Oregon v. Elstad, 470 U.S. 298 (1985). (Pet. at 5-10). Petitioner is incorrect. The court of appeals' resolution of whether the fruit of the poisonous tree doctrine applies to physical-evidence fruit of a Miranda violation is not inconsistent with either Michigan v. Tucker or Oregon v. Elstad because neither case decided the question.

a. In Michigan v. Tucker, 417 U.S. 433 (1974), the defendant was subjected to custodial interrogation without being fully advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). This was not surprising given that, at the time the defendant was questioned, Miranda had not yet been decided. The statements the defendant made led the police, not to some piece of physical evidence, but to a live witness. By the time of trial, Miranda had been decided, and the defendant moved to suppress both his statements and the testimony of the witness the government had discovered as the result of his statements. The trial court granted the motion as to the defendant's statements but not as to the testimony of the live witness. The court of appeals affirmed.

After this Court granted certiorari, both parties asked this Court to resolve the broad question of whether the fruit of the poisonous tree doctrine applies to all fruits of a Miranda violation, regardless of the nature of that fruit. The parties asked this

Court, in addition, to resolve this broad question without regard to the fact that the "Miranda violation" in question took place before Miranda had been decided.

This Court declined both requests. In affirming the lower court's decision that the testimony of the live witness should not be suppressed, this Court rested its holding on a "narrower ground" than that requested by the parties. Id. at 447. This Court rested its holding on the narrower ground that the fruit of the poisonous tree doctrine does not apply to live-witness fruit of a pre-Miranda Miranda violation. This Court reasoned that the fruit of the poisonous tree doctrine does not apply in such a case because the evidence the prosecution sought to introduce was the "testimony of a third party who was subjected to no custodial pressures" and who was "available at trial and subject to cross-examination by respondent's counsel," id. at 449, and because "the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda." Id. at 447.

This Court did not decide whether the fruit of the poisonous tree doctrine applies to physical-evidence fruit of a post-Miranda Miranda violation. See Patterson v. United States, 485 U.S. 922, 922-23 (1988) (White, J., dissenting from denial of certiorari) ("In Michigan v. Tucker, 417 U.S. 433, 447 (1974), this Court expressly left open the question of the admissibility of *physical* evidence obtained as a result of an interrogation conducted contrary to the rules set forth in Miranda v. Arizona, 384 U.S. 436 (1966)) (emphasis added).

b. In Oregon v. Elstad, 470 U.S. 298 (1985), the defendant was arrested at his home and subjected to custodial interrogation without being advised of his rights under Miranda. The defendant was then transported to the sheriff's office where he was questioned again, an hour after the first questioning. Before the second questioning began, the defendant was properly advised of his Miranda rights, and waived them. The defendant moved to suppress both his unwarned and his warned statements. The trial court granted the motion as to the unwarned statements, but denied it as to the warned statements. The court of appeals reversed the trial court's failure to suppress the warned statements, holding that the warned statements should have been suppressed as the fruit of the earlier Miranda violation.

This Court granted certiorari and reversed. This Court held that the warned statements properly were not suppressed because an initial failure to administer Miranda warnings before custodial questioning takes place does not forever disable a defendant from subsequently executing a valid waiver of his Miranda rights. This Court reasoned further that subsequently-warned statements are admissible notwithstanding an initial Miranda violation because the subsequent giving of Miranda warnings cures the initial Miranda violation.

This Court also focused in Elstad, as it did in Michigan v. Tucker, on the nature of the derivative evidence at issue. This Court noted that the derivative evidence in question, statements made by a living person who possesses the ability to exercise

violation, is not the same as derivative evidence in the form of "inanimate evidentiary objects." Elstad, 470 U.S. at 308-09 (quoting United States v. Ceccolini, 435 U.S. 268, 277 (1978)). This Court's holding in Elstad that "an initial failure of law enforcement officers to administer the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), without more, [does not] 'taint[]' subsequent admissions made after a suspect has been fully advised of and has waived his Miranda rights" does not decide the question decided by the court of appeals in this case, which is whether the fruit of the poisonous tree doctrine applies to physical-evidence fruit of a Miranda violation that is never subsequently cured. See Patterson v. United States, 485 U.S. 922, 922-23 (1988) (White, J., dissenting from denial of certiorari) ("While Elstad has been considered illuminating by some Courts of Appeals on the question of admissibility of *physical* evidence yielded from a Miranda violation, that decision did not squarely address the question presented here, and in fact, left the matter open.") (emphasis added).

3. Petitioner argues that the question the court of appeals decided in this case is an important one because it arises frequently. Petitioner asserts that the question arises frequently because the police often violate the constitutional requirements of Miranda.[2] (Pet. at 13). Assuming the validity of petitioner's

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[2] Petitioner's unsupported assertion that the police often violate Miranda appears to be contrary to this Court's observation in Dickerson that "Miranda has become embedded in routine police practice to the point where the warnings have

assertion that police officers often violate Miranda, this does not mean the question addressed by the court of appeals arises with frequency. The question addressed by the court of appeals was not what consequences flow from any violation of Miranda. Instead, it was what consequences flow when a police officer violates Miranda, the defendant makes a statement, the defendant's statement leads the police to derivative evidence, and the derivative evidence to which the police are led is in the form of an inanimate evidentiary object. Petitioner's assertion that the police often violate Miranda, even if true, does not support the leap in logic petitioner makes next, that "[t]he question whether Miranda requires exclusion not only of the suspect's unwarned statement but also its tangible fruits thus arises with some frequency." (Pet. at 13).

4. Petitioner further asserts that the question of whether a failure to comply with the requirements of Miranda "requires the suppression of physical evidence derived from the suspect's unwarned but *voluntary* statement" is squarely presented in this case. (Pet. at (I), (emphasis added). Such question is not in fact squarely presented, however, because whether Mr. Patane's statements were voluntary was a question raised but never decided in this case. This case is therefore an inappropriate vehicle for resolution of the question petitioner asks this Court to resolve.

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become part of our national culture." 530 U.S. at 443.

CONCLUSION

The court of appeals correctly followed this Court's precedents in applying the fruit of the poisonous tree doctrine to physical-evidence fruit of a Miranda violation. Further review is therefore unwarranted, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondent in Opposition and the accompanying Motion for

Leave to Proceed *In Forma Pauperis* were served on counsel for the petitioner by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Theodore B. Olson
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80203, on March 14, 2003, and all parties required to be served have been served.

Jill M. Wichlens
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Counsel of Record for Petitioner
633 17th Street, Suite 1000
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STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 14th day of March, 2003.

Clarita B Costigan
Clarita B. Costigan
Notary Public

My Commission Expires:
1-27-2005

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AFFIDAVIT OF MAILING

Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, a member of the Bar of this Court, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondent in Opposition and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were enclosed in an envelope, first-class postage prepaid and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80203, on March 14, 2003, and all parties required to be served have been served.

Jill M. Wichlens
JILL M. WICHLENS
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 14th day of March, 2003.

Clarita B Costigan
Clarita B. Costigan
Notary Public

My Commission Expires:

1-27-2005